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The Role of the Constitutional Courts in Harmonising Criminal Legislation in the EU: Romania's Experience

ABSTRACT: *The study aims to explore the role of constitutional courts in the development of European criminal law by analyzing the use of EU law within the constitutional review of criminal legislation. The case law of the Constitutional Court of Romania provides important benchmarks in this regard, expressed in ways such as: the interpretation of the "cornerstone" of the Constitution making the national normative system "accessible" to EU law, the interpretation of constitutional principles in the sense of the legislator's obligation to transpose EU law and ensuring normative coherence, the articulation of criminal policies (national and EU), the creation of a "doctrine" on the use of EU law rules within the constitutional review. The case law examination revealed the gradual opening of the CCR towards an interpretation and approach to criminal law in conjunction with the case law of the ECHR in the application of the ECHR, as well as with the standards for the protection of fundamental rights regulated/interpreted or recommended by EU bodies. The intention of the article was not to analyse how European criminal law institutions are reflected in the constitutional review, but to reveal a trend of approach and reporting which, in our opinion, can also be interpreted as a statement of the principle of the need to regulate certain criminal law institutions, even the criminalisation of certain acts, with reference to the general EU framework or objectives. Even if this study does not cover all the issues in the field, it can be a start for proceeding to a comparative law study on the role of European constitutional courts in the development of European criminal law.*

KEYWORDS: European criminal law, criminal policy, constitutional review, EU legal order, Constitutional Court of Romania

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1. Introduction

The harmonisation of legislation at the EU level is the result of various measures and methods that involve the participation of several actors, both at the national and supranational levels. This political will has been embodied in successive amendments to the founding treaties and the adoption of new regulations, which are consistently supported by their interpretations. The contributions of various courts, particularly constitutional courts, are noteworthy in this regard, as they facilitate the enforcement and development of legislative instruments.

This contribution is particularly important in fields such as criminal law and criminal procedure, which are more challenging to harmonise through legislation. This is due to the specific limits established by the rules of competence set out in Articles 82 et seq. of the Treaty on the Functioning of the EU (TFEU), the constitutional conditions applicable in certain Member States (MS), and the challenges established by the various standards for the protection of fundamental rights. When it comes to the future of the EU, it is essential for the courts of law to be involved and for criminal rules to be interpreted coherently. This is because legislative harmonisation is not an end in itself,[1] but rather a means to achieve certain policy objectives as well as an overall 'European common good'. In this light, the case law of the courts of law that contributes to this harmonisation through forms of explicit or implicit dialogue plays an important role as a building block in the areas of freedom, security, and justice. This ensures a 'high level of security' and protection for the common values of the MS and their citizens.

The aim of this study is to explain the role of constitutional courts in the development of European criminal law, with reference to an indirect form of 'constitutional dialogue', namely the use of EU law within the constitutional review of criminal legislation. The case law of the Constitutional Court of Romania (CCR) provides important benchmarks in this regard, such as the interpretation of the 'cornerstone' of the Constitution for making the national normative system 'accessible' to EU law, the interpretation of constitutional principles in the sense of the legislator's obligation to transpose EU law and to ensure normative coherence,[2] the articulation of criminal policies (national vs. EU), the creation of a 'doctrine' on the use of EU law rules within the constitutional review applicable regardless of the branch of law to which the rules belong.

Romania's experience is meaningful in terms of the specifics that marked its accession to the EU, namely, the establishment of a Cooperation and Verification Mechanism. Due to this Mechanism, from the very moment of accession, the criminal legislation 'settled' a new level, as one of the obligations undertaken

1 Schroeder, 2020.
2 See also Neagu, 2022, 2023.

by Romania was that of amending the Criminal Code and Criminal Procedure Code. Furthermore, the development of criminal legislation and the impact of new concepts of criminal law and criminal procedure have been scrutiny for the past 15 years.[3] The annual reports of the European Commission welcomed the adoption of the Criminal and Criminal Procedure Codes in 2009 and 2010[4] and their implementation in 2014[5], appreciated as '*an approach of proportions and, at the same time, tested the adaptability of the judicial system*'; this also emphasised deficiencies such as the numerous amendments and adaptations of the codes or unconstitutionalities found by the CCR.[6] A 2018 report[7] discussed this issue extensively, reaching a certain impasse owing to the amendments that constitute 'a deep revision of the 2014 codes'.

To have a complete understanding of the changes made to criminal law during this period, it is necessary to analyse not only the new codes but also the case law of the CCR. Equally relevant are the solutions pronounced on the exceptions of unconstitutionality, by which, also harnessing EU acts, the CCR sanctioned unconstitutional legislative solutions and the decisions pronounced within *a priori* review. Regarding the latter category of cases, two extensive decisions from 2018 on the laws amending the Criminal Procedure Code[8] and the Criminal Code,[9] which intertwine the Constitution and EU law, are often seen through the lens of the general binding effect of CCR decisions that had previously sanctioned breaches of the same EU law. Following these decisions, the establishment of criminal law 'in the womb of constitutionality' was often achieved by conferring constitutional relevance on European rules and with direct reference to them. EU law appears many times as a mandatory 'framework' of the legislator's actions at the national level, as well as a source of strengthening the guarantee of fundamental rights. In this light, the constitutionalisation of Romanian criminal law moved along with the development of European criminal law.

This study intends to open up a new perspective of comparative law on the above coordinates in by examining the involvement of EU constitutional courts in shaping European criminal law.

3 The CVM was closed at the end of 2023.
4 Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism {SWD(2012) 231 final}.
5 Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism {SWD(2015) 8 final}.
6 Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism {SWD(2016) 16 final}, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism {SWD(2017) 701 final}.
7 Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism {SWD(2018) 551 final}.
8 Decision No 633/2018, Official Gazette no. 1020 of 29 November 2018.
9 Decision No 650/2018, Official Gazette no. 97 of 7 February 2019.

2. The reinterpretation of the Romanian Constitution and its influence on the development of criminal law

The accession to the EU and the 'accommodation' of the national legislation for normative coherence and the fulfilment of Romania's obligations as an EU MS determined the adaptation of the Constitution, both through its amendment before the accession (in 2003) and after this moment, based on its interpretation by the CCR. This article considers the reinterpretation of the constitutional guarantees of fundamental rights, which belong to the very core of the Constitution (revision limits), as to provide support for the amendment of criminal legislation in harmony with European regulations in the matter. A significant example is the reinterpretation of the presumption of lawful acquisition of wealth in Article 44, paragraph 8 of the Constitution ('Legally acquired assets shall not be confiscated. Legality of acquirement shall be presumed').

Therefore, over time, and long before the moment of accession to the EU, there were initiatives to revise the Constitution that tried to eliminate this presumption, which was seen as an obstacle to the confiscation of unlawfully acquired assets. However, each time the CCR found the proposals to be unconstitutional on the grounds that they violated the limits of the revision of the Constitution.[10] Thus, by Decision No 85/1996[11], referring to the debates that accompanied the adoption of the 1991 Constitution, the CCR held that:

> The legal certainty of the right of property over the assets that make up a person's assets is [...] inextricably related to the presumption of lawful acquisition of assets. Therefore, the removal of this presumption has the significance of suppressing a constitutional guarantee of the right of property.

Likewise, by Decision No 148/2003[12] on the unconstitutionality of the wording proposed to be introduced in the Constitution, wording that exemplified the presumption in question was used, establishing that it does not apply 'to the assets acquired as a result of the capitalization of proceeds from criminal offences'. The Court noted that, from this wording, the aim is to overturn the burden of proof regarding the lawful nature of the assets, providing for the unlawful nature of the assets acquired through the capitalisation of the proceeds from criminal offences; this wording essentially aims at the same objective, namely the removal of the presumption on the lawful acquisition of assets.

10 See Article 152 of the Constitution.
11 Official Gazette of Romania, Part I, no. 211 of 6 September 1996.
12 Official Gazette of Romania, Part I, no. 317 of 16 April 2003.

Romania's accession to the EU in 2007 brought back into question the guarantee laid down in Article 44 (8) of the Romanian Constitution under the Council Framework Decision 2005/212/JHA of 24 February 2005 on the Confiscation of Crime-Related Proceeds, Instrumentalities, and Property.[13] The adoption of this Framework Decision was determined by the need for an instrument that considers the best practices in the MS with due respect for the principles of law and provides for the possibility of introducing into criminal, civil, or fiscal law, as the case may be, of a reduction in the burden of proof as regards the source of the assets owned:

> Each Member States shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty form more than one year, or property the value of which corresponds to such proceeds.[14]

In relation to these obligations, a new revision of the Constitution, initiated in 2011 by the President of Romania at the proposal of the Government, once again regulated the removal of the presumption of lawful acquisition of assets. Consistent with the interpretation of the limits of revision of the Constitution,[15] the CCR determined the unconstitutionality of this proposal, holding that:

> in the absence of such a presumption, the owner of an asset would be subject to continuous insecurity since, whenever the unlawful acquisition of the respective asset would be invoked, the burden of proof would not be on the person making the claim, but on the owner of the asset.

However, Decision No 799/2011[16] marks a new approach of the CCR, which held that:

> the regulation of this presumption does not prevent the primary or delegated legislator, in applying the provisions of Article 148 of the Constitution - Integration into the European Union, to adopt regulations that allow full compliance with Union law in the fight against crime.

13 Published in the Official Journal of the European Union Law 68 of 15 March 2005, pp. 49–51.
14 See Article 3 of the said act, with the marginal title *Enhanced Confiscation Powers.*
15 See Article 152 of the Constitution of Romania.
16 Official Gazette no. 440 of 23 June 2011.

Even if it did so through an *obiter dictum* reason, the CCR expressly mentioned the Council Framework Decision 2005/212/JHA of 24 February 2005 on the Confiscation of Crime-Related Proceeds, Instrumentalities, and Property, thus integrating for the first time an EU act within the constitutional review of initiatives for the revision of the Romanian Constitution.

This decision by the CCR was decisive for the amendment of criminal law in accordance with EU law. One year after the pronouncement of the CCR, the measure of extended confiscation was introduced into Romanian legislation by Law. 63/2012, amending and supplementing the Criminal Code of Romania and Law 286/2009 on the Criminal Code, which transposes Council Framework Decision 2005/212/JHA of the European Union. Currently, the concept of extended confiscation is regulated by Article 112[1] of the Criminal Code, and mostly takes over the provisions of Article 118[2] of the 1969 Criminal Code. Investing in the constitutional review of the newly introduced provisions,[17] the CCR determined compliance with the measure of extended confiscation with the presumption of the lawful nature of the acquisition of assets enshrined in Article 44 (8) of the Constitution. This interpretation was made in the light of the 'living law',[18] applied equally by the European Court of Human Rights (ECtHR)[19] and also used by CCR in significant cases that shaped the limits of its competence.[20] According to the CCR, property rights are not absolute, because they may have certain limitations. Therefore, it cannot be claimed that a guarantee of this right has an absolute nature. This presumption does not reverse the burden of proof and the principle of *actori incumbit probatio* remains fully applicable. Beyond all reasoning, there is a shift in the interpretation of a constitutional presumption to identify a modus operandi within legal pluralism.

17 Decision no. 356/2014, Official Gazette no. 691 of 22 September 2014; Decision no. 11/2015, Official Gazette, no.102 of 9 February 2015.

18 See also Murphy, 2012; Nelken, 2008; Maziau, 2011; Ehrilch, 1936, cited in O'Day, 1966 stated that 'the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself'.

19 For example, the judgment of 7 July 1989 pronounced in the *Soering Case* against the United Kingdom: 'The Convention is a living instrument, which must be interpreted in the light of the current conditions'; The judgment of 29 April 2002 pronounced in the Case of *Pretty v. the United Kingdom*: 'The Court must take a dynamic and flexible approach to the interpretation of the Convention, which is a living instrument, any interpretation having to be consistent with its fundamental objectives and its coherence as a system of human rights protection'.

20 For example, in Decision No 766/2011, the CCR reinterpreted the phrase "in force" in Law No 47/1992 on organizing and functioning of the CCR in a manner likely to widen the access to the constitutional justice through the possibility of having the repealed rules subject to constitutional review, to the extent that they are applicable to the litigation in which the exception of unconstitutionality was raised.

3. Compatibility of the national legislation with relevant EU regulations: Applying the rules of legislative technique, in the light of legal certainty and rule of law

Although not exclusively related to criminal legislation, it is worth noting an important aspect to interpreting the principles enshrined in the Romanian Constitution, which is an approach that supports normative coherence at the intersection of national and supranational plans.

Therefore, taking as grounds the provisions of Articles 1 (3) and (5) of the Constitution which enshrine the principles of the rule of law and legality in conjunction with Article 20, which compels the interpretation of the constitutional provisions in line with international treaties in the field of human rights, Romania is party to and incorporates the case law of the ECtHR regarding the quality standards of the law; the CCR jurisprudentially advanced *the principle of legal certainty.*[21] The objective criteria for assessing the fulfilment of this principle were identified in Law 24/2000 on the rules of legislative techniques for the elaboration of normative acts.[22] The CCR held that, although the rules of legislative technique,

> do not have constitutional value, by regulating them the legislator imposed a series of mandatory criteria for the adoption of any normative act, the observance of which is necessary to ensure the systematization, unification and coordination of the legislation, as well as the content and the appropriate legal form for each normative act. Thus, the observance of these rules contributes to ensuring a legislation that complies with the principle of certainty of legal relationships, having the necessary clarity and predictability.[23]

According to Law 24/2000, any proposed legislative solution must consider the relevant regulations of the European Union to ensure compatibility (Article 22). In addition, any motivational instrument must include its impact on the legal system:

> the implications that the new regulation has on the legislation in force; compatibility with the relevant Community regulations, their exact determination and, where appropriate, future measures harmonization that is required; decisions of the Court of Justice of the European Union and other relevant documents for the transposition

21 For a comparative perspective, see Ficsor, 2018.
22 Official Gazette no. 260 of 21 April 2000.
23 Decision no. 681/2012, Official Gazette no. 477 of 12 July 2012).

> or implementation of the respective legal provisions; implications for domestic law, in case of ratification or approval of some treaties or international agreements, as well as the necessary adaptation measures; the legislative harmonisation concerns.[24]

The harnessing of these legal obligations within the constitutional review determines that the reception/transposition/coherence with EU Law is not only a specific obligation enforced by Article 148 of the Romanian Constitution (as it governs the relationships with EU Law), but also a requirement of the rule of law, enshrined in Article 1(3). From this perspective, the incidence of standards set forth by the rule-of-law mechanism is currently in operation within the EU. This mechanism places special emphasis on the legislative process and the quality of laws at the MS level.[25]

There are numerous relevant decisions regarding criminal matters in which the CCR has sanctioned the lack of quality of the regulations in relation to the requirements of the rule of law.[26] An example is related to the reception of the EU Act in the national order. Therefore, in underlining the obligations of the national legislature through the lens of the requirements of the rule of law and quality of the law, the CCR found that:

> the transposition of the European Directives into national law may lead to legislative inconsistencies in the situation where the national legislator carries out its powers in violation of the legislative technical norms that require, inter alia, making the necessary correlations.

Such a situation was sanctioned by the Court, for example, when it was referred to as a legislative mismatch determined by the transposition of Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences.[27] In that case, as a result of the redefinition in legislation of the concept of 'motor vehicle' and the express exclusion of 'agricultural and forestry tractors' from the category of motor vehicles in accordance with the provisions of the mentioned Directive, the act of driving an agricultural or forestry tractor on public roads, without having a driving licence, remained in Romanian legislation outside of any criminal sanction. Being referred with an exception of unconstitutionality,

24 Article 31(a).

25 *2023 Rule of Law Report* [Online] Available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2023-rule-law-report_en?prefLang=ro (Accessed: 1 February 2024).

26 See, for example, Decision no 51/2016, Official Gazette no 190 of 14 March 2016, where the Court upheld the exception of unconstitutionality and found that the phrase "or other specialized organs of the state" from the provisions of Article 142 (1) of the Criminal Procedure Code is unconstitutional.

27 OJ UE L, no. 403 of 30 December 2006, subsequently amended and supplemented.

the CCR found that the legislative solution provided by Article 335(1) of the Criminal Code, which does not criminalise the act of driving an agricultural or forestry tractor on public roads without a driving licence, was unconstitutional.[28] To reach this solution, the CCR examined both the relevant internal legislation, the way in which it was amended, as well as Directive 2006/126/EC, concluding that they did not aim to decriminalise such an act, and this regulatory deficiency generates a state of unconstitutionality in relation to Article 1 paragraphs (3) and (5) of the Constitution. The resonance of the CCR raises an aspect of criminal policy that we will approach separately.

4. The architecture of the national criminal policy and its articulation with the EU criminal policy

In light of the example mentioned, legislative correlation can be examined in terms of harmoniously integrating EU regulations into national legislation and establishing criminalisation norms (criminal policy).

Therefore, regarding 'accidental' decriminalisation, as a result of the transposition of the Directive mentioned above, the CCR reminded that: 'the legislator cannot carry out the power to incriminate and decriminalize some anti-social acts except in compliance with the norms and principles enshrined in the Constitution' and that 'the legislator cannot can proceed to remove the criminal legal protection of values with constitutional status'. These engage the scope of criminal policy, understood as a set of political choices made by the State to determine, guide and implement the 'power to punish', over which it has monopoly.[29] Therefore, a field that seemed to be the monopoly of the legislator gradually became shared with the constitutional courts, in the context of the general evolution of these courts from the status of 'negative legislator' to that of quasi-positive one. Joining these trends,[30] the CCR has stated in numerous decisions that, although it does not have the power to undertake itself the criminal policy of the State,[31] it has the power 'to censor the legislator's option if it violates the principles and constitutional

28 Decision No 224/2017, Official Gazette no. 427 of 9 June 2017.

29 Fortis, 2012, p. 707.

30 Other constitutional courts have also undertaken the role of control/interpreter of criminal policy; for example, the doctrine mentions the French Constitutional Council, which issued "genuine criminal policy directives addressed to the judicial authority" within the constitutional review of some laws in 2004, see Lazerges, 2004, as cited by Fortis, 2012.

31 Decision no. 650/2018, cited above.

requirements'.[32] Thus, according to the CCR, 'the Court's intervention is legitimate only to the extent that the State's ability to fight against the criminal phenomenon is affected or when fundamental rights and freedoms are not respected'.[33]

In this regard, the most spectacular developments regarding the constitutional review of criminal norms concern the configuration of the legislator's discretion on the incrimination/decriminalisation of certain facts,[34] regarding which the CCR emphasised that:

> it is not and it cannot be absolute. Thus, [the legislator] must, by its option, on the one hand, bring a proportional infringement on the individual freedom of the criminal, taking into account the social relationships disregarded by him, and, on the other hand, to protect public order and safety, as well as the rights and the fundamental freedoms of the other persons, taking account of the dangerousness of the criminal. Therefore, the State's criminal policy must be designed in such a way as to strike a fair balance competing interests; such a balance is a guarantee associated with the rule of law.[35]

Defining the discretion of the legislator's appreciation, the CCR issued both decisions by which it found the criminalisation rules unconstitutional and decisions by which it found the rules of decriminalisation or relaxation of the sanctioning treatment unconstitutional, sometimes referring to its analysis of EU policies or the case law of the CJEU on the matter.

Therefore, as far as the first category of decisions is concerned, an interesting development, which also capitalises on EU law, is the enshrinement of the *ultima ratio* principle. The significance of the mentioned principle was explained by a series of decisions, the first of which was pronounced regarding the rules for criminalising the abuse of office (including the abuse of office against the interests of individuals, criminalised in the Criminal Code of 1969).[36] By this decision, the Court upheld the exception of unconstitutionality and found that the provisions of Article 246 of the Criminal Code of 1969 and of Article 297 (1) of the Criminal Code are constitutional in so far as the phrase 'carries out in a defective manner'

32 In this regard, see Decision No 824/2015, Official Gazette, Part I, no. 122 of 17 February 2016, Decision no. 62 of 18 January 2007, published in the Official Gazette, Part I, no. 104 of 12 February 2007, or Decision no. 363 of 7 May 2015, published in the Official Gazette, Part I, no. 495 of 6 July 2015, Decision No 392 of 6 June 2017, published in the Official Gazette, Part I, no. 504 of 30 June 2017).

33 Decision No 650/2018, cited above.

34 See, for details, Forms and Limits of Judicial Deference: The Case of Constitutional Courts, Available at: https://cecc.constcourt.md/pages/congress/en/national-reports.html.

35 Decision No 650/2018, cited above.

36 Decision No 405/2016, Official Gazette, Part I, no. 517 of 8 July 2016.

in their content means 'carries out in violation of the law'.[37] Given that, in the basic version, both the crime of abuse of office and the crime of negligence in office provide, as an identical normative method, the '*defective carrying out*' of an official duty, the Court found that both the solution and the recitals of the mentioned decisions regarding the way of interpreting the phrase '*carries out in a defective manner*' are applicable *mutatis mutandis* with regard to the crime of negligence in office.[38] Later, ruling in an *a priori* review over the amended to bring it in line with the decisions of the CCR, the Court found that the legislator did not achieve this compliance, noting that:

> in the application of Decision No 405 of 15 June 2016 the legislator should have been mainly concerned with defining the intensity of the injury, with reference to the rights or legitimate interests of a natural or legal person, and not with establishing a derisory value threshold in itself, which, in fact, does not settle the issue of the *ultima ratio* nature of the criminal sanction. Practically, through the regulation of the analysed text, the same issue will persist regarding the difficulty of delimiting the various forms of liability, compared to the criminal one[39].

To define the *ultima ratio* principle (and the involvement in this way in the criminal policy of the Romanian State), the CCR also made the argument of the criminal policy of the EU, in that:

> in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions towards an EU Criminal Policy: ensuring the effective implementation of EU policies through criminal law, COM/2011/0573, at point 2.2.1 - Necessity and Proportionality - Criminal law as a means of last resort (ultima ratio) - it is specified that 'criminal investigations and sanctions may have a significant impact on citizens' rights and include a stigmatizing effect. Therefore, criminal law must always remain a measure of last resort. Therefore, the legislator needs to analyse whether measures other than criminal law measures, e.g. sanction regimes of administrative or civil nature,

37 Decision No 392/2017, Official Gazette no. 504 of 30 June 2017.
38 Decision No 518/2017, Official Gazette no. 765 of 26 September 2017.
39 Decision No 650/2018, cited above.

> could not sufficiently ensure the policy implementation and whether criminal law could address the problems more effectively.[40]

Moreover, it is not the first or only decision in which the CCR refers to the EU policy in criminal matters. Similarly, in Decision 356/2014[41] or Decision 11/2015,[42] the CCR referred to the recitals of the decision on the EU policies in the matter, quoting the Communication of the Commission to the European Parliament and the Council, COM (2008) 766 final, aiming at the need for tools to discourage organised crime activities, such as the confiscation and recovery of assets held by offenders.

More recently, examining in the *a priori* review the law amending Article 369 of Law No 286/2009 regarding the Criminal Code, regarding the crime of incitement to violence, hatred or discrimination,[43] the Court found their unconstitutionality, holding, *inter alia*, that the obligation to legislate respecting the requirements of necessity and proportionality of the criminal measures that the law requires, in the light of the *ultima ratio* principle, is not fulfilled, nor the constitutional requirements regarding the quality of the law. Referring to the criteria that can constitute grounds for the existence of the offence, the CCR invoked Article 1, titled 'Offences concerning racism and xenophobia', from Council Framework Decision 2008/913/JHI of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. Similarly, the CCR resumed the reference to the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions towards a policy of the European Union in criminal matters: ensuring the effective implementation of European Union policies through criminal law, COM(2011) 0573, at point 2.2.1 – Necessity and proportionality – criminal law as a measure of last resort (*ultima ratio*), also invoked in the previous decisions.

In another case, in which it examined the exception of unconstitutionality of the provisions of Article 22 (1) (c) in conjunction with those of Article 21 (1) (a) of Law No 211/2004 on some measures to ensure the information, support, and protection of victims of crimes,44 the CCR held, inter alia, that:

> at the EU level, the concern to ensure the protection of victims in a common area of freedom, security and justice is reflected in the Communication from the Commission 'Victims of crime in the European Union - reflections on standards and action' (14 July 1999),

40 Decision 392/2017, paragraph 44, See also Decision No 858/2017 regarding the exception of unconstitutionality of the provisions of Article 297 (1) of the Criminal Code, Official Gazette no. 340 of 18 April 2018.
41 Official Gazette no. 691 of 22 September 2014.
42 Official Gazette no. 102 of 9 February 2015.
43 Decision no. 561/2021, Official Gazette no. 1076 of 10 November 2021.
44 Decision No 312/2022, Official Gazette no. 940 of 26 September 2022.

> in the Council Framework Decision on the standing of victims in criminal proceedings (15 March 2001) and in the Green Paper 'Compensation of victims of crime' of the European Commission (28 September 2001).

Even if the CCR does not clearly state the 'weight' of the European policy documents in the formation of its conviction regarding the unconstitutionality of the aforementioned regulations, their use in the structure in the recitals can support the idea of 'pleading' or 'orientation' of the legislator towards the articulation of national criminal policies with European ones.

5. European law within constitutional review in Romania: The theory of 'interposed norms' and the use of EU law in the constitutional review of criminal legislation

■ *5.1. General characterisation*

Whereas we referred, in the previous sections, to the development of the criminal legislation as a whole, in terms of the constitutional foundation and the requirements of the rule of law, we will further provide some specific examples of 'sanctioning' as unconstitutional the criminal rules adopted in violation of the EU legislation in the same field.

Remarkable is the legal mechanism through which the CCR introduced EU law into the constitutional review, by establishing the so-called doctrine of 'interposed norms'. Therefore, by Decision No 668/2011[45], the CCR ruled upon 'the use of a rule of European law within the constitutional review as a rule interposed to the reference rule' stating that it:

> implies, pursuant to Article 148 (2) and (4) of the Romanian Constitution, a cumulative conditionality: on the one hand, this rule must be sufficiently clear, precise and unequivocal by itself or its meaning has been established clearly, precisely and unequivocally by the Court of Justice of the European Union and, on the other hand, the rule must be subject to a certain level of constitutional relevance, so that its normative content supports the possible violation by the national law of the Constitution - the only direct rule of reference within the constitutional review. In such a hypothesis, the approach of the Constitutional Court is distinct from the simple application and interpretation of the law, a power that belongs to the courts and

45 Official Gazette no. 487 of 8 July 2011.

> administrative authorities, or from any issues related to the legislative policy promoted by the Parliament or the Government, as the case may be.

The Court further stated that:

> through the stated cumulative conditionality, it falls within the discretion of the Constitutional Court to enforce within the constitutional review the judgments of the Court of Justice of the European Union or to formulate preliminary questions by itself in order to establish the content of the European rule. Such an attitude is related to the cooperation between the national and the European constitutional court, as well as to the judicial dialogue between them, without bringing into the account the aspects related to the establishment of hierarchies between these courts.

This 'doctrine' reconciles the viewpoint of the CCR regarding the primacy of the Constitution and Romania's obligations as an EU MS, which also the Constitution itself (Article 148 – *Integration into the European Union*) establishes.

However, by examining CCR jurisprudence, we believe that there is currently no clear methodology for using the doctrine of interposed norms. Often, the Constitutional Court simply refers to European regulations in their reasoning without explicitly stating that it is using them within the framework of the interposed norm doctrine. Nevertheless, these references are helpful in demonstrating a common approach at the EU level to the regulatory areas being analysed. This approach should not be viewed as controlling internal legislation compared to EU norms. According to the theory of interposed norms, the Constitution is the only direct rule of reference in constitutional reviews. To illustrate this approach, we briefly present below some examples of important decisions in which the Constitutional Court referred to EU law.

■ *5.2. The reference to EU law in the constitutional review of criminal and criminal procedural rules*

5.2.1. The constitutional relevance of Directive 2012/13/EU of the European Parliament and of the Council

The Court found the unconstitutionality of the legislative solution according to which access/refusal of access to essential information for the settlement of the criminal case is ordered by an administrative authority and the refusal cannot be subject to judicial review[46], mentioning, in its reasoning, also the Directive

46 Decision No 21/2018, Official Gazette no. 175 of 23 February 2018.

2012/13/EU of the European Parliament and of the Council, on the right to information in criminal proceedings.[47]

Thus, the CCR was requested to rule in cases with the exception of the unconstitutionality of Articles 352 (11) and (12) of the Criminal Procedure Code, according to which:

> (11) If the classified information is essential for the settlement of the case, the court urgently requests, as the case may be, the total declassification, partial declassification or the transition to another level of classification or allowing access to the classified information by the defendant's counsel.
> (12) If the issuing authority does not allow the defendant's counsel access to the classified information, it cannot be used in order to issue a decision to convict, to waive the application of the punishment or to postpone the application of the punishment in question.

First, the Court proceeded to examine the '*normative and jurisprudential context, national and European, on the right to information in the criminal proceedings*', in which sense it consistently referred to Directive 2012/13/EU of the European Parliament and of the Council (Article 6 – Right to information about the accusation, paragraph 28 of the preamble of the Directive, regarding the State's obligation to provide information about the accusation, Article 7 – Right of access to the materials of the case, Article 10 – Maintaining the level of protection).

As for the examined context, including the provisions of the cited Directive, the CCR held that such a legislative solution, which constrains the use of classified information, qualified by the judge as essential for the settlement of the criminal trial and regarding which it assesses the incidence of the defendant's right to information; the judge qualifies as evidence in the case file, with the permission of the issuing administrative public authority to access them:

> is likely to impede the judicial bodies from fulfilling their obligation laid down in Article 5 (1) of the Code of Criminal Procedure, that of 'ensuring the finding of the truth about the facts and circumstances of the case, based on evidence, and about the person of the suspect or defendant'. Moreover, the provisions of Article 352 (11) and (12) of the Code of Criminal Procedure also impair the legal effects of the provisions of Article 1 (2) of the Code, according to which 'The criminal procedure rules are intended to provide effective exercise of the judicial bodies' responsibilities and guarantee the rights of

47 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

> the parties and the other participants in the criminal proceedings so as to comply with the Constitution, the European Union constitutive Treaties, the other European Union regulations in criminal procedure matters and of the pacts and agreements on fundamental human rights that Romania is a party to. (para. 62)

Similarly, the CCR held that access to certain information/materials/documents may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security, mentioning that:

> for this hypothesis, Directive 2012/13/EU on the right to information in criminal proceedings provided in Article 7 (4), a provision that has not yet been transposed into national legislation, that »Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review«.

As a conclusion, the CCR considered that

> the impugned legislative solution provides the opposite of what is stipulated in European law, to the effect that access/refusal of access to essential information for the settlement of the criminal case is ordered by an administrative authority, and the refusal cannot be subject to judicial review. (para. 65)

The CCR also invoked in this regard also the case law of the CJEU, namely the obligation of conforming interpretation, noting that it:

> requires that national courts do everything within their powers, taking into consideration the national law as a whole and applying the methods of interpretation recognized by it in order to guarantee the full effectiveness of the directive in question and to identify a solution in accordance with the purpose pursued by it.(para. 72)[48]

48 See the Decision of the Grand Chamber of 24 January 2012, pronounced in Case C-282/10, *Maribel Dominguez v. Center informatique du Center Ouest Atlantique and Prefet de la Region Centre*, paragraph 27.

Having examined the structure of the CCR decision recitals, this represents a clear application of the doctrine of interposed norms in the sense of assigning constitutional relevance to Directive 2012/13/EU of the European Parliament and Council. The mentioned European act is integrated into the constitutional review through the established reference and specific relevance given to both the preamble and the express provisions of the Directive, to substantiate the unconstitutional solution of the phrase 'the court shall request' in connection to the phrase 'allowing access to that classified level by the defendant's counsel' contained in Article 352 (11) of the Criminal Procedure Code, as well as of the phrase 'issuing authority' contained in Article 352 (12) of the Criminal Procedure Code.

With reference to the effects of the CCR decisions laid down in Article 147 of the Constitution, bringing the impugned rules in line with the provisions of the Constitution implicitly means an agreement with the meaning of the regulation and protection of fundamental rights in the criminal proceedings imposed by it. Thos idea follows explicitly from the subsequent decision[49] CCR found in an *a priori* review the constitutionality of the provisions that gave effect to the solution of unconstitutionality, noting that the legislative solution:

> is in accordance with the provisions of Decision No 21 of 18 January 2018 and also transposes into national law the provisions of Article 7 (4) of Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings, published in the Official Journal of the European Union, series L, no. 142 of 1 June 2012.

The same Directive mentioned above[50] was integrated into the constitutional review of Article 386 (1) of the Criminal Procedure Code, according to which:

> When during the court proceedings, it deems that the legal charges for the crime in the bill of indictment are about to be changed, the court is under an obligation to discuss the new legal charges and to draw the defendant's attention that he has the right to ask for the case to be adjourned for later during the same court session or to be postponed, to prepare his defence.

This case did not raise the issue of unconstitutionality *per se* of the impugned text, but one of the unconstitutionalities that resulted from its interpretation by the court of law. Likewise, this case is about the development (which can be

49 Later, by Decision No 284/2023, Official Gazette no. 490 of 6 June 2023.

50 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

addressed in the activism key) of the powers of the CCR, which also undertook the sanctioning of the unconstitutional interpretations when they resulted from an established practice of the courts of law. The CCR justifies its power to intervene in such situations by stating:

> the diversion of the legal regulations from their legitimate purpose, through a systematic interpretation and their inaccurate application by the courts of law or by the other subjects called to apply the provisions of the law, may lead to the unconstitutionality of that regulation. In this case, the Constitutional Court is entrusted with the removal of the flows of unconstitutionality thus established and ensuring respect for the rights and freedoms of individuals, as well as the primacy of the Constitution, being crucial is such situations (para.48)[51].

The CCR considered the grounds of unconstitutionality formulated by the author and the answers formulated by the courts of law, which the CCR required to communicate the jurisprudential orientation regarding the procedural moment and the type of decision interlocutory order/sentence/criminal judgment by which the court ordered the change of the legal charges for the crime in the bill of indictment. Based on these findings, the CCR noted that, as a rule, regarding the change of the legal charges for the crime in the bill of indictment, the court of law shall adjudicate at the end of the trial, by judgment, sentence, or decision, depending on the procedural stage and respecting the obligations to discuss the new legal charges with the parties and to inform the defendant that he has the right to ask for the case to be adjourned later during the same court session or to be postponed to prepare his defence. With regard to this practice, the Court held that, according to Directive 2012/13/EU of the European Parliament and Council, on the right to information in criminal proceedings, where, in the course of the criminal proceedings, the details of the accusation change to the extent that the position of suspects or accused persons is substantially affected, which should be communicated to them where necessary to safeguard the fairness of the proceedings and in due time to allow for an effective exercise of the right of defence (paragraph 29). At the same time, Article 6 (4) of the same Directive establishes that: 'Member States shall ensure that suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article [A/N information on accusation], where this is necessary to safeguard the fairness of the proceedings'.

51 In this regard, Decision No 448/2013, Official Gazette no. 5 of 7 January 2014, and Decision No 336/ 2015, Official Gazette no. 342 of 19 May 2015, paragraph 30.

As a reasoning structure of the CCR's decision, it is worth noting also the acceptance of the mentioned Directive in conjunction with the Convention for the Protection of Fundamental Rights and Freedoms, the CCR noting that

> in the application of the guarantee regulated in Article 6 (3) a) of the Convention, specific to a fair trial, in criminal matters, the European Parliament and the Council of the European Union issued Directive 2012/13/EU on the right to information in criminal proceedings.

Under these conditions and also referring to the rich case law of the ECtHR, the Court found that only by ordering the change of the legal charges for the crime by a judgment that does not settle the merits of the case after allowing the parties to express their opinion on the new legal charges, but prior to the settlement of the case, ensures the fairness of the proceedings and the possibility of continuing to exercise an effective defence, where it is only in relation to a definitively established legal classification, during the criminal proceedings, and not at the end of it, that the defendant can provide an actual defence. As a result, to ensure the fairness of the proceedings and to effectively exercise the right to defence, the only interpretation that ensures the impugned text – Article 386 (1) of the Code of Criminal Procedure – compliance with the provisions of the Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms is the one that requires that the change in the legal charges for the crime in the bill of indictment be carried out by the court of law through a judgment that does not settle the merits of the case after allowing the parties to express their opinion on the new legal charges, but prior to the settlement of the case.[52]

5.2.2. The constitutional relevance of Directive 2012/29/EU of the European Parliament and of the Council

The Court found the constitutional relevance of the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA[53] by Decision No 633/2018,[54] issued in *a priori* review of the provisions of Article I point 41 of the law amending and supplementing Law 135/2010 regarding the Code of Criminal Procedure, as well as amending and supplementing Law 304/2004 on judicial organisation, according to which

52 Decision No. 250/2019, Official Gazette no. 500 of 20 June 2019.
53 Published in the Official Journal of the European Union, No. 315 of 14 November 2012.
54 Official Gazette No.1020 of 29 November 2018.

> In Article 83, after letter b) a new letter is inserted, letter b[1]), with the following wording: b[1]) the right to be notified of the date and time of the criminal prosecution act or of the hearing conducted by the Judge of Rights and Freedoms. Notification shall be made by telephone, fax, e-mail or other similar means, concluding a protocol in this regard. Its absence shall not prevent the performance of the act.

The CCR considered that the legislative solution indicated by the legislator ignored the provisions of Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 whose transposition into national law shall be mandatory, according to Article 148 of the Constitution.

According to the CCR, the Directive establishes the obligation for Member States to regulate criminal procedures to '*avoid contact between the victim and its family members, on the one hand, and the offender, on the other hand*'. Regarding the enforcement of this provision, the European regulation exemplifies the most frequent situation that may be encountered in practice and provides the solution in compliance with the proposed goal, namely 'summoning the victim and the offender at hearings at different times'.

The CCR further cited paragraphs 53 and 57 of the preamble of the Directive, and, in applying the principles stated in the preamble, the provisions of Article 18, entitled Right to protection, stipulating that:

> Without prejudice to the rights of the defence, Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying. When necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members.

The CCR considered that, by enshrining the right to protection, the European legislator established a presumption of the victim's state of vulnerability, the result of post-traumatic stress, of the relationship of dependence, subordination, or even fear related to the power, control, or threat exercised by the offender or result of other causes, including self-blame (even in the absence of any contribution to what happened to him/her). The victim sometimes cannot even be aware of his/her status as a victim, he/she does not have the ability to understand the objective content of his/her rights and their practical effect, nor the concrete procedural steps that must be taken or their role, he/she cannot detect the reasons for fear in the affective complex in which they For this reason, the obligation to assess the risk of secondary victimisation rests with the state bodies and, first of all,

with the legislator, who must adopt appropriate measures, including 'procedures established under national law for the physical protection of victims and their family members'. In this regard, the provisions of Article 19 are titled *Right to avoid contact between victim and offender.*

Under these conditions, '*taking account of the provisions of European law contained in the Directive, which Romania must transpose and enforce*'; the Court found that the legislator not only ignored these, but regulated on the contrary, granting an additional procedural right to the defendant, to the extent that his right to defence shall be ensured by the provisions of Article 92 (1) of the Code of Criminal Procedure, in force, which establishes the right of the suspect's or defendant's counsel to assist in carrying out any act of criminal prosecution. Granting this right to the defendant, the legislator ignores the effects of his presence during the performance of any act of criminal prosecution, including hearings, on the criminal investigation. Therefore, his presence, for example, at the hearing of witnesses or injured persons, may have an intimidating nature, such that they are restrained in their statements and do not declare everything they know about the crime under investigation, destabilising the fairness of the criminal proceedings.

Pursuing the same line of case law and with reference to the same constitutional and legal framework of the EU, the CCR also issued Decision 121 of 2 March 2021,[55] by which it rejected, as unfounded, the exception of unconstitutionality, and found that the provisions of Article 83 read in conjunction with Article 81 (1) g) of the Criminal Procedure Code, of Article 306 read in conjunction with Article 81 (1) f) of the Criminal Procedure Code, as well as of Article 346 (3) in conjunction with Article 342, which is in turn related to Article 8 of the Code of Criminal Procedure are constitutional in relation to the criticisms formulated.

Likewise, in Decision 108/2022, the Court found that the previously mentioned grounds are also applicable mutatis mutandis to the suspect's or defendant's counsel, who has the right to witness the performance of any criminal investigation act, except for those provided by criminal procedural law. In this regard, the Court notes that, having the right to participate in the hearing of any person by the Judge for Rights and Liberties, to formulate complaints, requests, and memoranda (Article 92 (4) of the Code of Criminal Procedure), the suspect's or defendant's counsel may request to be informed of the date and time when a criminal investigation act is performed or of the hearing conducted by the Judge for Rights and Liberties, benefiting, at the same time, from the time and facilities necessary for the preparation and implementation of an effective defence (Article 92 (8) of the Code of Criminal Procedure). The court noted that this was the first criminal investigation stage.

55 Official Gazette No. 715 of 20 July 2021.

5.2.3. The constitutional relevance of Directive (EU) 2016/343 of the European Parliament and of the Council

The Court found the unconstitutionality of the legislative solution which does not regulate the witness's right to silence and non-self-incrimination,[56] also taking into account the constitutional relevance of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

Thus, invested with the settlement of the exception of unconstitutionality of several provisions, including Article 118 of the Criminal Procedure Code, according to which

> *A witness statement given by a person who had the capacity as suspect or defendant before such testimony or subsequently acquired the capacity of suspect or defendant in the same case, may not be used against them. At the moment when they record the statement, judicial bodies are under an obligation to mention their previous capacity,*

the CCR applied not only the provisions of the Convention and ECtHR case law regarding the right against self-incrimination and the right of the 'accused' to silence, but also Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

Specifying, as in other cases, the European context of analysis, the CCR cited the provisions regulating the right to silence and non-self-incrimination included in Article 7 (1) and (2) of the Directive, the preamble of the Directive, regarding its applicability 'to natural persons who are suspects or accused persons in criminal proceedings' and 'at all stages of the criminal proceedings until the decision on the final determination of whether the suspect or accused person has committed the criminal offence has become definitive', its provisions regarding the obligation of the States to inform suspects or accused persons, as well as the specification contained in point 45 of the preamble of Directive (EU) 2016/343, in the sense that the Directive:

> establishes minimum rules, Member States should be able to extend the rights laid down in this Directive in order to provide a higher level of protection. The level of protection provided for by Member States should never fall below the standards provided for by the Charter or by the ECHR, as interpreted by the Court of Justice and by the European Court of Human Rights.

56 Decision No. 236 of 2 June 2020.

The CCR stated that this goal, reiterated in the preamble of numerous directives,

> results from the need to create minimum standards for the protection of human rights and the development of a common system of fundamental rights and freedoms, through the regulation at European level of a system of protection of human rights, an integral part of the general principles of European law – ius communae.

As a result of the analysis, the CCR found that, at the European level, both suspects/accused persons of committing acts provided for by criminal law (*de jure* suspects) and witnesses (*de facto* suspects; persons suspected prior to an official notification, who later acquire the quality of *de jure* suspect) benefit from identical protection in terms of the right to silence and non-self-incrimination. Finding that, regarding the witness 'Article 118 of the Code of Criminal Procedure does not allow the application of the right to non-self-incrimination similar to the suspect or defendant', the CCR upheld the exception of unconstitutionality and found that the legislative solution contained in Article 118 of the Code of Criminal Procedure, which does not regulate the witness's right to silence and non-self-incrimination, was unconstitutional.

This decision constitutes a jurisprudential upturn, grounded by the CCR by referring to the same doctrine of 'living law'. Similarly, this decision illustrates the way in which national courts may directly enforce the constitution in the case of a legislative vacuum, a possibility that constitutes, in itself, a strong guarantee of fundamental rights and freedoms. In this regard, the CCR held that:

> until the adoption of the appropriate legislative solution, as a consequence of the present decision to uphold the exception of unconstitutionality (...) in order to ensure the witness's right to silence and non-self-incrimination, the judicial bodies should directly enforce the provisions of Article 21 (3), Article 24 (1) and Article 23 (11) of the Constitution. (para. 84)[57]

In another case, called to decide whether, in the event of not concluding the plea bargain or its rejection by a final court judgment, the statement given by the defendant, according to Article 482 g) of the Code of Criminal Procedure to conclude the plea bargain, it can be used in the common law criminal proceedings

57 Regarding the direct application of the Constitution, see Decision No 486/1997, Official Gazette no. 105 of 6 March 1998, Decision No 186/1999, Official Gazette no. 213 of 16 May 2000, Decision No 774/ 2015, Official Gazette no. 8 of 6 January 2016, Decision No 895/2015, Official Gazette no. 84 of 4 February 2016, Decision No 24/2016, Official Gazette no. 276 of 12 April 2016, par.34, Decision No 794/2016, Official Gazette no. 1.029 of 21 December 2016, par. 37, Decision No 321/2017, published in the Official Gazette

by which the criminal case will be settled, the CCR decided that such use would be unconstitutional.

The CCR analysed the right to silence, finding, also with reference to the case law of the ECtHR, that it is a procedural right, limited to the criminal procedural guarantees established by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (see the Constitutional Court Decision 236 of 2 June 2020, paragraph 46). In this context, the CCR invoked the preamble of Directive (EU) 2016/343 (points 12, 24, 25, 27, 31 and 48), emphasising again the reason according to which:

> the analysed Directive establishes minimum rules, Member States should be able to extend the rights laid down therein in order to provide a higher level of protection; it is also stipulated that the level of protection provided for by Member States should never fall below the standards provided for by the Charter of Fundamental Rights of the European Union or the Convention, as interpreted by the Court of Justice of the European Union and the European Court of Human Rights. (para. 49)

Noting that the initiation of the plea bargain, followed by the non-conclusion of this bargain or its rejection through final court judgment, has the consequence of returning the defendant to the procedural situation prior to the initiation of the special proceedings under consideration, conditions in which he/she benefits from all the specific guarantees of the right to defence and of the presumption of innocence, the CCR considered that:

> taking into account the requirements of the right to silence and non-self-incrimination, analysed above, (...) the administration, as evidence, contrary to the will of the defendant, in ordinary criminal proceedings, of the statement given by her/him under Article 482 (g) of the Code of Criminal Procedure, in case of non-conclusion or rejection of the plea bargain, it is tantamount not only to a violation of the right to defence, but also to a violation of the presumption of innocence, regulated in Article 23 (11) of the Constitution. (para. 51)[58]

5.2.4. The constitutional relevance of the Directive (EU) 2016/800 of the European Parliament and of the Council

The Court found the unconstitutionality of the provisions of art. 505 paragraph (2) of The Code of Criminal Procedure, as well as the phrase 'who has not reached the age of 16' contained in art. 505 paragraph (1) of the Code of Procedure. In the

58 Decision No 490/2022, Official Gazette no. 1240 of 22 December 2022.

context, the Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings[59] was also taken into account.

Through this decision,[60] the CCR has eliminated the discrimination present in the Code of Criminal Procedure regarding juvenile offenders based on their age. Previously, it was mandatory to summon the parents, guardian, or person responsible for the minor, as well as the social assistance and child protection authorities, for any legal proceedings involving a minor under the age of 16. However, for minors aged 16 and above, summoning these individuals was only required if deemed necessary by the investigating authorities. The Court ruled that this differentiated regulation for minors aged 16 and above is not justified, especially as all minors between the ages of 14 and 18 are subject to educational measures according to the Criminal Code. The Court found this discrimination to be unconstitutional, granting minors access to the same legal protections regardless of their age. The CCR referenced Directive (EU) 2016/800 of the Council of the European Union, which focuses on procedural guarantees for children involved in criminal proceedings. The directive aims to establish minimum standards to ensure that all children under the age of 18 suspected or accused in criminal cases can understand the procedures and exercise their right to a fair trial. The CCR highlighted that new complementary guarantees have been put in place to address the specific needs and vulnerabilities of children. These guarantees include providing information to both children and their parents or guardians. The directive also ensures that a child's parent or guardian is informed as soon as possible about the information the child is entitled to receive.

Additionally, the directive grants children the right to be accompanied by their parent or guardian during various stages of the procedure, excluding court hearings. It also allows children to have the support of their parent or guardian during other stages of the procedure, such as police questioning.

5.2.5. The constitutional relevance of the Directive (EU) 2016/800 of the European Parliament and of the Council

The unconstitutionality of the provisions of art. 505 paragraph (2) of The Code of Criminal Procedure, as well as the phrase 'who has not reached the age of 16' contained in art. 505 paragraph (1) of the Code of Procedure. The constitutional relevance of the Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings[61] is examined in the following.

59 Official Journal nr. L132 of 21 May 2016.
60 Decision No.102/2018, Official Gazette no. 400 of 10 May 2018.
61 Official Journal nr. L132 of 21 May 2016.

Through this decision,[62] the CCR has eliminated the discrimination present in the Code of Criminal Procedure regarding juvenile offenders based on their age. Previously, it was mandatory to summon the parents, guardian, or person responsible for the minor, as well as the social assistance and child protection authorities, for any legal proceedings involving a minor under the age of 16. However, for minors aged 16 and above, summoning these individuals was only required if deemed necessary by the investigating authorities. The Court ruled that this differentiated regulation for minors aged 16 and above is not justified, especially as all minors between the ages of 14 and 18 are subject to educational measures according to the Criminal Code. The Court found this discrimination to be unconstitutional, granting minors access to the same legal protections regardless of their age. The CCR referenced Directive (EU) 2016/800 of the Council of the European Union, which focuses on procedural guarantees for children involved in criminal proceedings. The directive aims to establish minimum standards to ensure that all children under the age of 18 suspected or accused in criminal cases can understand the procedures and exercise their right to a fair trial. The CCR highlighted that new complementary guarantees have been put in place to address the specific needs and vulnerabilities of children. These guarantees include providing information to both children and their parents or guardians. The directive also ensures that a child's parent or guardian is informed as soon as possible about the information the child is entitled to receive.

Additionally, the directive grants children the right to be accompanied by their parent or guardian during various stages of the procedure, excluding court hearings. It also allows children to have the support of their parent or guardian during other stages of the procedure, such as police questioning.

5.2.6. The constitutional relevance of Directive (EU) 2016/343 of the European Parliament and of the Council

The constitutionality of the provisions of the Code of Criminal Procedure to the extent that the statement given by the defendant in order to conclude the plea bargain cannot be used, against the will of the defendant, as evidence in the criminal trial, aimed at settling the case according to the common law criminal proceedings. The constitutional relevance of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings is examined in the following.

Called to decide whether, in the event of not concluding the plea bargain or its rejection by a final court judgment, the statement given by the defendant, according to Article 482 g) of the Code of Criminal Procedure to conclude the plea bargain, it can be used in the common law criminal proceedings by which

62 Decision No.102/2018, Official Gazette no..400 of 10 May 2018.

the criminal case will be settled, the CCR decided that such use would be unconstitutional.

The CCR analysed the right to silence, finding, also with reference to the case law of the ECtHR, that it is a procedural right, limited to the criminal procedural guarantees established by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (see the Constitutional Court Decision 236 of 2 June 2020, paragraph 46). In this context, the CCR invoked the preamble of Directive (EU) 2016/343 (points 12, 24, 25, 27, 31 and 48), emphasising again the reason according to which:

> the analysed Directive establishes minimum rules, Member States should be able to extend the rights laid down therein in order to provide a higher level of protection; it is also stipulated that the level of protection provided for by Member States should never fall below the standards provided for by the Charter of Fundamental Rights of the European Union or the Convention, as interpreted by the Court of Justice of the European Union and the European Court of Human Rights. (para. 49)

Noting that the initiation of the plea bargain, followed by the non-conclusion of this bargain or its rejection through final court judgment, has the consequence of returning the defendant to the procedural situation prior to the initiation of the special proceedings under consideration, conditions in which he/she benefits from all the specific guarantees of the right to defence and of the presumption of innocence, the CCR considered that:

> taking into account the requirements of the right to silence and non-self-incrimination, analysed above, (...) the administration, as evidence, contrary to the will of the defendant, in ordinary criminal proceedings, of the statement given by her/him under Article 482 (g) of the Code of Criminal Procedure, in case of non-conclusion or rejection of the plea bargain, it is tantamount not only to a violation of the right to defence, but also to a violation of the presumption of innocence, regulated in Article 23 (11) of the Constitution. (para. 51)[63]

6. Conclusions

While this study may not cover all aspects of CCR's impact on the development of European criminal law, it serves as a starting point for comparative legal research

63 Decision No 490/2022, Official Gazette no. 1240 of 22 December 2022.

on the role of European constitutional courts in shaping European criminal law. The degree to which constitutional courts use EU law in their decisions on criminal legislation, the structure of legal argumentation, and the types of cases in which EU law affects the constitutional review of criminal law rules are all indicators of the relationship between the constitutionalisation and Europeanisation of criminal law.

As far as the case law of the CCR is concerned, it can be argued that the development of EU law and its increasing involvement with national law has led to a 'theorisation' of constitutional interpretation. This resulted in the establishment of a doctrine of EU rules with constitutional relevance used in constitutional reviews. In the context of criminal law, EU rules have been used to analyse new concepts of criminal law and criminal procedures. These concepts (e.g. plea bargain) have no tradition in Romanian legislation. As a model of argumentation, those decisions seem to be anchored in the provisions of the ECHR and ECtHR case law, to which EU law (e.g. Directives) is added for establishing what CCR calls a 'European context' of analysis. Moreover, the CCR is based on ECtHR case law when, invoking the 'living law' theory, it reconsiders the interpretation of some legal institutions, including the Constitution, to allow a harmonious connection to EU law. For example, in the jurisprudential upturn by which it practically introduced, in Romanian legislation, the witness's right to remain silent, the CCR held that this type of interpretation '*shall take direct effects regarding the establishing of the normative content of the reference rule, namely the Constitution, and in this regard the Court is the only jurisdictional authority that has the power to give such an interpretation*' (para. 82).[64] The use of the 'doctrine of the living law' appears as substantiating the interpretation of the reference rules in carrying out the constitutional review so as to '*provide an increased legal protection for the subjects of law*' (para. 83). According to the CCR, '*the upward development of this protection is noticeable in the case law of the Constitutional Court, an aspect that allows it to establish new requirements for the legislator or to adapt the existing constitutional requirements in various fields of law.*'[65]

The case law examination revealed the gradual opening of the CCR towards an interpretation and approach to criminal law in conjunction with the case law of the ECHR in the application of the ECHR, as well as with the standards for the protection of fundamental rights regulated/interpreted or recommended by EU bodies. Similarly, by calling into question the limits of legislation on criminal matters on the border of criminal policy, the CCR guides the legislator's actions towards the meaning and objectives of EU policy. However, as we can see from the examples above, there currently needs to be a clear methodology for using the

64 Ad similis, Decision No 276/2016, Official Gazette no. 572 of 28 July 2016, par. 19, namely Decision No 369/2017, Official Gazette no. 582 of 20 July 2017, paragraph 19.

65 For example, Decision No. 308/2016, Official Gazette no. 585 of 2 August 2016, Paragraph 31.

recent doctrine of the interposed (EU) in constitutional review. It is thus necessary to clarify and refine the instrument by explaining the relationship between norms and their effects on court decisions.

This intention of this article was not to analyse how European criminal law institutions are reflected in the constitutional review, but to reveal a trend of approach and reporting which, in our opinion, can also be interpreted as a statement of the principle of the need to regulate certain criminal law institutions, even the criminalisation of certain acts, with reference to the general EU framework or objectives. In any case, the aforementioned case law still indicates a period of experimentation based on the steps the Court took in its argumentation and accommodating constitutional plans. However, establishing the approach in the constitutional review of criminal law supports the idea that establishing European criminal law must not appear as a reaction to crisis situations, such as the escalation of terrorism or organised crime, but, above all, as a will for common regulation to achieve a common criminal policy to protect the same shared values.

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